

ENGLAND

1794

REGISTERED

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JOHN Y. B. A. N.

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- I. THE ANTIQUITY,
- II. THE EXCELLENT DESIGN USE,
- III. THE OFFICE AND PRIVILEGES
- OF JURIES,

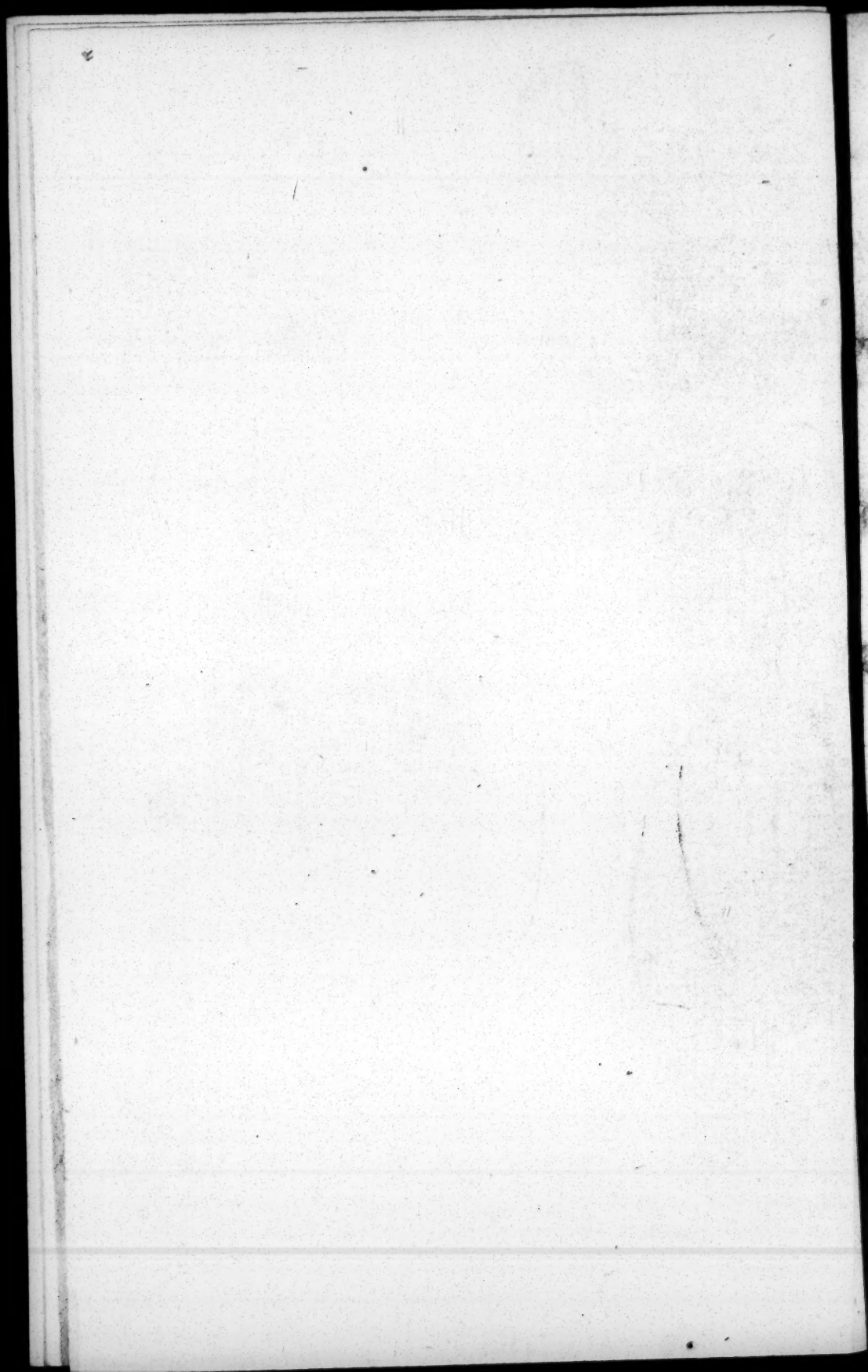
OF THE LAW OF ENGLAND

BY JOHN BAKER, Knight,

Solicitor-General to the late King William

LONDON

Printed in the Year 1794



TO THE
BOOKSELLER.

SIR,

THIS comes to you from a Country Gentleman, descended from a Family who have always distinguished themselves in the Cause of Liberty; and though very old, I have not out-lived the Desire of seeing that great Blessing secured to Posterity. As I was not only an Eye-Witness of the illegal and arbitrary Proceedings in the Reigns of King Charles and King James the Second, but myself a Sufferer by them,

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them, I heartily concurred in the Revolution with all the little Assistance in my Power, as well as my good Wishes. I was in hopes that we should have reaped all the Advantages from that great and glorious Event, which the sincere and most zealous Promoters of it were promised and expected. But many of us, who were most cordially devoted to the Interests of Liberty and our Country, complained, and I think with too much Reason, of our Disappointment; which we were willing however to impute to the Exigencies of the Times, and the Difficulties generally attending a new Settlement. The War, which immediately followed it, seemed, in some Measure, to excuse those, who flattered us with Hopes that they would take a favourable Opportunity to compleat and perfect this great Blessing. We were willing to believe that the Bill of Rights (though not so full, in many Points, as we could have wished) and the Limitations of the Crown, in the Act of Settlement, would have been sufficient to secure us from any dangerous Attempts on our Liberties for the future. But it is a melancholy Consideration, to reflect on the Difficulties which
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the People are almost constantly obliged to struggle with, against the Incroachments of Courts and Ministers; who, though they have frequently been the most strenuous Advocates for Liberty, and seemingly the most zealous in the Prosecution of other bad Ministers; yet, if they happen to succeed them, too frequently renounce their old Principles, and from the Remembrance of the Trouble they gave to their Predecessors, become the most dangerous and inveterate Enemies of those who adhere to the same Principles: An Observation, which hath often given me great uneasiness; but Retirement and the Indolence natural to old Age would, in all probability, have worn it off, if I had not been lately very much alarmed by several Papers, which, as I am informed, are with great industry dispersed in this, and I suppose in all other Counties. As I am still in the same Way of Thinking, that I was forty Years ago, it is with great Grief and Astonishment, that I see the fundamental Principles of our Constitution struck at in those Papers; the great Ends of the Institution of Parliaments attempted to be rendered useless, by the open and avowed pleading
for

their Dependency on the Crown ; a Doctrine, which the most shameless Abettors of Tyranny and arbitrary Power, in former Times, would have blushed to have published ; and to compleat their Wickedness, they are covertly endeavouring to undermine the Rights and Privileges of an English Jury, that great Security, on which our Lives and Properties depend ; which we only, of all the Nations of Europe, enjoy ; and which hath distinguished our happy Constitution from all others in the most distant Periods of Antiquity.

I must confess that I did not think I should have lived to see such pernicious Doctrines revived so soon after we had smarted under them, and when it hath cost the Nation so much Blood and Treasure to be delivered from the mischievous Consequences of them.

The Memory, which I still retain of the dread and terror we were continually under in those Times, not only from pack'd and corrupted Juries, but from the Influence of the Courts upon weak and timorous Juries, fills me with the greater Indignation

tion and Abhorrence at these vile Betrayers of the Interests of their Country; and makes me judge it highly necessary, at this Time, to furnish my Fellow-Subjects with some Antidotes against such Poison, of which I have many in my Study, collected from the Writings of those Times, when I made my first appearance in the World. At present, I think I cannot do better than in desiring you to reprint this excellent little Treatise, in which the original Design, Duty and Power of Jurors are so clearly explained, that it will be sufficient to instruct all those, who shall, on these Occasions, have the Lives and Properties of their Fellow-Subjects in their hands, and I hope encourage to discharge this Duty with the Courage and Integrity becoming Englishmen, who are intrusted with so great and invaluable a Privilege.

It was published at the latter end of King Charles the Second's Reign, and generally believed to be written by that able and honest Lawyer, Sir John Hawles, who was made Solicitor-General to King William after the Revolution, for his Services in the Cause of Liberty.

I shall

I shall only add, that if this Piece should meet with that Reception from the Publick, which it deserves, I may, perhaps, furnish you with some others in my Custody, relating to the same Subject.

I am, Sir,

Your unknown Friend,

and a Lover of my Country,

Devonshire,
Dec. 20, 1731.

J. K.

T H E

T H E
E N G L I S H M A N ' S
R I G H T, &c.

Barrister.

MY old *Client* ! a good morning to you ; whither so fast ? You seem intent upon some important Affair.

Juryman. Worthy Sir ! I am glad to see you thus *opportunely*, there being scarce any person that I could at this time rather have wish'd to meet with.

Barr. I shall esteem myself happy, if in any thing I can serve you.—The *Business*, I pray ?

Jurym. I am summon'd to appear *upon a Jury*, and was just going to try if I could get off. Now I doubt not. but you can put me into the best Way to obtain that Favour.

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Barr.

Barr. It is probable I could : But first let me know the *Reasons* why you desire to *decline that Service* ?

Jurym. You know, Sir, there is something of *Trouble* and *Loss of Time* in it; and Men's *Lives Liberties*, and *Estates* (which depend upon a Jury's *Guilty*, or *Not Guilty*, for the Plaintiff, or for the Defendant) are *weighty Things*. I would not wrong my Conscience for a World, nor be accessory to any Man's Ruin. There are others *better skilled* in such Matters. I have ever so loved *Peace*, that I have forborn going to *Law*, (as you well know many times) though it hath been much to my loss.

Barr. I commend your *Tenderness* and *Modesty*; yet must tell you, these are but general and *weak Excuses*. As for your Time and Trouble, it is not *much*; and however, can it be better spent than in doing *Justice*, and serving your Country ? To withdraw yourself in such Cases, is a kind of *Sacrilege*, a robbing of the Publick of those Duties which you justly owe it; the more *peaceable* Man you have been, the *more fit* you are. For the Office of a *Jury-man* is, *conscientiously to judge his Neighbour*; and needs no more *Law* than is easily learnt to direct him therein. I look upon you therefore as a Man well qualified with *Estate*, *Discretion* and *Integrity*; and if all such as you should use private Means to avoid it, how would the King and Country be honestly served ? At that rate we should have none but *Fools* or *Knaves* intrusted in

in this grand Concern, on which (as you well observe) the Lives, Liberties, and Estates of all England depend.

Your *Tenderness* not to be accessary to any Man's being wrong'd or ruin'd, is (as I said) much to be commended. But may you not incur it unawares, by seeking thus to avoid it? *Pilate* was not innocent because he wash'd his Hands, and said, *He would have nothing to do with the Blood of that just One*. There are faults of *Omission* as well as *Commission*. When you are legally called to try such a Cause, if you shall shuffle out yourself, and thereby Persons perhaps less conscientious happen to be made use of, and so a Villain escapes Justice, or an innocent Man is ruined, by a prepossest or negligent Verdict; can you think yourself in such a Case wholly blameless? *Qui non prohibet cum potest, jubet: He abets Evil, that prevents it not when he may. Nec caret scrupulo Societatis occultæ qui evidentè facinori desinit obviare: He deserves not to be free from the suspicion of a close Society, or underhand Conspiracy in the Mischief of subverting the fundamental Laws and Liberties of the Nation, who ceases to obviate and oppose it.*

Jurym. Truly, I think, a Man is bound to do all the good he can, especially when he is lawfully call'd to it. But there sometimes happen nice Cases, wherein it may be difficult to discharge one's Conscience, without incurring the displeasure of the Court, and thence Trouble and Damage may arise.

Barr. That is but a *vain* and *needless* Fear. For as the Jurors *Privileges* (and every *Englishman's* in and by them) are very considerable; so the Laws have no less providentially guarded them against Invasion or Usurpation. So that there needs no more than, first, *Understanding* to know your Duty, and in the next place *Courage* and *Resolution* to practise it with Impartiality and Integrity, free from accursed *Bribery* and *Malice*, or (what is full as bad in the end) base and servile *Fear*.

Jurym. I am satisfied, that as it is for the *advantage* and honour of the Publick, that Men of *understanding*, *substance* and *honesty*, should be employed to serve on Juries, that *Justice* and *Right* may fairly be administered; so it is *their own* Interest, when called thereunto, readily to bestow their Attendance and Service, to prevent *ill Precedents* from Men otherwise qualified; which may by degrees *fatally*, though insensibly, undermine our just Birth-rights, and perhaps *fall heavy* one day upon us, or our Posterity. But for my own part, I am fearful lest I should suffer through my *Ignorance* of the Duty and Office of a Jurymen, and therefore on that account principally it is, that I desire to be excused in my Appearance; which if I understood but so well as I hope many others do, I would with all my Heart attend the Service.

Barr. You speak honestly, and like an *Englishman*. But if that be all your cause of Scruple, it may soon be removed, if you will but give your-

yourself a very *little trouble* of Inquiry into the necessary Provisions of the Law of *England* relating to this matter.

Jurym. There is nothing (of a *temporal* Concern) that I would more gladly be inform'd in, because I am satisfied, it is very *expedient* to be generally known. And first, I would learn *how long* Trials by Juries have been used in this Nation?

Barr. Even *Time out of Mind*; so long, that our best *Historians* cannot date the Original of the Institution, being indeed *cotemporary* with the Nation itself, or in use as soon as the People were reduced to any Form of *Civil* Government, and Administration of Justice. Nor have the several Conquests or Revolutions, the Mixtures of *Foreigners*, or the mutual Feuds of the *Natives*, at any time been able to suppress or overthrow it, For,

1. That Juries (the *Thing* in effect and *substance*, though perhaps not just the Number of *twelve* Men) were in use among the *Britons*, the first Inhabitants of this Island, appears by the ancient Monuments and Writings of that Nation, attesting that their *Freeholders* had always a *Share* in all Trials and Determinations of Differences.

2. Most certain it is, that they were practised by the *Saxons**, and were then the *only Courts*, or at least an essential, and the greater part of

* *Lamb.* p. 218. *Coke*, 1 par. *Institutes*, fol. 155.

all Courts of Judicature: For so (to omit a multitude of other Instances) we find in King *Ethelred's Laws*, *In singulis Centuriis, &c.* *In every Hundred let there be a Court, and let twelve ancient Freemen, together with the Lord, or rather, according to the Saxon, the Greve, i. e. the chief Officer amongst them, be sworn, That they will not condemn any Person that is innocent, nor acquit any one that is guilty.*

3. When the Normans came in, *William*, tho' commonly called the Conqueror, was so far from abrogating this Privilege of Juries *, That in the fourth year of his Reign, *he confirmed all King Edward the Confessor's Laws, and the ancient Customs of the Kingdom*, (whereof this was an essential and most material Part.) Nay, he made use of a Jury chosen in every County, to report and certify on their Oaths what those Laws and Customs were; as appears in the Proem of such his Confirmation.

4. Afterwards when the *Great Charter*, commonly called *Magna Charta*, (which is nothing else than a recital, confirmation and corroboration of our ancient *English Liberties*) was made and put under the Great Seal of *England*, in the ninth Year of King *Henry the Third*, (which was *Anno Domini 1225.*) then was this Privilege of Trials by Juries in an especial manner confirmed and established; as in the fourteenth Chapter, *That no Amercements shall be assessed, but*

* See *Spelman's Glossar.* in the word *Jurata.*

*by the Oath of good and honest Men of the Vicinage. And more fully in that Golden nine and twentieth Chapter—No Freeman shall be taken or imprisoned, nor be disseized of his Freehold or Liberties, or free Customs, or be out-law'd, or exiled, or any other way destroyed, nor shall we pass upon him, or condemn him, but by the lawful Judgment of his Peers, &c. Which Grand Charter, having been confirmed by above thirty Acts of Parliament, the said Right of Juries thereby, and by constant Usage, and common Custom of England, which is the common Law, is brought down to us as our undoubted Birth-right, and the best Inheritance of every Englishman. For as that famous Lawyer, Chief Justice Coke *, in the words of Cicero, excellently avers, Major Hæreditas venit unicuique nostrum a jure & legibus quam a parentibus: It is a greater Inheritance, and more to be valued, which we derive from the fundamental Constitution and Laws of our Country, than that which comes to us from our respective Parents. For without the former, we have no claim to the latter.*

Jurym. But has this Method of Trial never been attempted to be invaded or justled out of Practice?

Barr. It is but rarely that any have arrived to so great a Confidence: For it is a most dangerous Thing to shake or alter any of the Rules or fundamental Points of the Common Law, which, in truth, are the main Pillars and Supporters of the Fabrick

* 2 Institut. fol. 56.

of the Commonwealth. These are Judge Coke's Words *. Yet sometimes it has been endeavoured. But so sacred and valuable was the Institution in the eyes of our Ancestors, and so tenacious were they of their privileges, and zealous to maintain and preserve such a *vital part* of their Birth-right and Freedom, that no such Attempts could ever prove effectual, but always ended with the shame and severe punishment of the rash Undertakers. For example,

1. *Andrew Horn*, an eminent Lawyer, in his Book, intituled, *The Mirrour of Justices*, (written in the Reign of King *Edward I.* now near 400 Years ago) in the fifth Chapter, and first Section, records, That the renowned Saxon King *Alfred* caused *four and forty Justices* to be hanged in one Year, as *Murderers*, for their *false Judgments*: And there recites their particular Crimes, most of them being in one kind or other Infringements, Violations, and Encroachments of and upon the Rights and Privileges of Juries. Amongst the rest, that worthy Author tells us, he *hanged one Justice Cadwine*, because he judged *one Hackwy* to death without the Consent of all the Jurors; for whereas he stood upon his Jury of twelve Men, because three of them would have saved him, this Cadwine removed those three, and put others in their room, on the Jury, against the said Hackwy's Consent. Where we may observe, that though at last twelve Men did give a Verdict

* 2 Institut. pag. 74.

against him, yet those, so put upon him, were not accounted *his Jurors*; by reason all, or any of them, who were first sworn to try him, could not (by *Law*) be removed, and others put in their stead: And that such *illegal* Alteration was then adjudged a *capital* Crime, and forthwith the said *Cadwine* was *hanged*.

2. A second Instance I shall give you in the Words of the Lord Chief Justice Coke *.
 ' Against this ancient and *fundamental Law* (and
 ' in the face thereof) there was in the eleventh
 ' Year of King *Henry VII.* cap. 3. an Act of
 ' Parliament obtained (on fair Pretences, and a
 ' *specious Preamble*, as to avoid divers Mischiefs,
 ' &c.) whereby it was ordained, *That from*
thenceforth, as well Justices of Assize, as Justices of
the Peace, upon a bare Information for the King be-
fore them made, without any finding or presentment
by the Verdict of twelve Men, should have full Power
and Authority by their Discretions, to hear and deter-
mine all Offences and Contempts, committed or done
by any Person or Persons against the Form, Ordinance
or Effect of any Statute made and not repealed, &c.
 ' By colour of which Act (saith Coke) shaking
 ' this fundamental Law (*he means, touching all*
 ' *Trials to be by Juries*) it is not credible what
 ' HORRIBLE OPPRESSIONS and EXAC-
 ' TIONS, to the undoing of MULTITUDES
 ' of People, were committed by Sir *Richard*
 ' *Empson* Knight, and *Edmund Dudley*, Esq; (be-

* Coke 2. part of Institutes, fol. 51.

‘ ing Justices of the Peace) throughout *England*;
 ‘ and upon this unjust and injurious Act (as
 ‘ commonly in like Cases it falleth out) a *new*
 ‘ Office was erected, and they made Masters of
 ‘ the King’s Forfeitures.’

But not only this Statute was justly, soon after the decease of *Henry VII.* repealed by the Statute of the 1 *Henry VIII.* cap. 6. but also the said *Empson* and *Dudley* (notwithstanding they had such an *Act* to back them, yet it being against *Magna Charta*, and consequently void) were fairly executed for their pains; and several of their Under-Agents, as *Promoters*, *Informers*, and the like, severely punished, for a warning to all others that shall dare (on any Pretence whatsoever) infringe our *English Liberties* *. For so the Lord † *Coke* having (elsewhere) with detestation mentioned their Story, pathetically concludes; *Qui eorum vestigiis insistant, exitus perhorrescant: Let all those who shall presume to tread their Steps, tremble at their dreadful End.* Other Instances of a later date might be given, but I suppose these may suffice.

Jurym. Yes, surely; and by what you have discoursed of the long continued Use of *Juries*, and the zealous Regards our Ancestors had not to part with them, I perceive that they were esteemed a *special Privilege*. Be pleased therefore to acquaint me wherein the *Excellency* and *Advan-*

* See Sir Rich. Baker’s Chron. p. 273.

† 4 Part Instit. fol. 41.

ages to the People, by that method of trial above others, may consist?

Barr. This Question shews you have not been much conversant *abroad*, to observe the *miserable* Condition of the poor People in most *other Nations*, where they are either *wholly subject* to the *despotic arbitrary* Lusts of their Rulers; or at best under such Laws as render their Lives, Liberties, and Estate, liable to be disposed of at the *discretion* of Strangers appointed their Judges, most times *mercenary*, and Creatures of Prerogative; sometimes *malicious* and oppressive, and often *partial* and corrupt *. Or suppose them ever so *just and upright*, yet still has the Subject no Security against the Attacks of unconscionable *Witnesses*; yea, where there is *no sufficient Evidence*, upon bare suspicions, they are obnoxious to the *Tortures of the Rack*, which often make an *innocent* Man confess himself *guilty*, merely to get out of present Pain. Is it not then an *inestimable Happiness* to be born and live under such a *mild* and righteous Constitution, wherein *all these Mischiefs* (as far as human Prudence can provide) are prevented; where none can be condemn'd, either by the *Power* of superior Enemies, or the *Rashness* or *Ill-will* of any Judge, nor by the bold Affirmations of any *profligate Evidence*; but no less than *twelve honest, substantial,*

* See all this excellently made out, and more at large, by the L. C. J. Fortescue, afterwards Chancellor to K. Hen. VI. in his Book *De laudibus Legum Angliæ*, cap. 26, 27, 28, 29.

impartial Men, his *Neighbours* (who consequently cannot be presumed to be unacquainted either with the Matters charged, the Prisoner's Course of Life, or the Credit of the Evidence) must first be *fully satisfied* in their Consciences, that he is *guilty*, and so all unanimously pronounce him upon their *Oaths*? Are not these, think you, *very material Privileges*?

Jurym. Yes, certainly, though I never so well consider'd them before. But now I plainly see our Forefathers had, and we still have, *all the reason in the World* to be zealous for the Maintenance and Preservation thereof from Subversion or Encroachments, and to transmit them *intire* to Posterity. For if once this *Bank* be broken down or neglected, an *Ocean* of Oppression, and the Ruins of infinite Numbers of People, (as in *Empson* and *Dudley's* Days) may easily follow, when on any pretence they may be made *Criminals*, and then fined in vast Sums, with pretext to enrich the King's Coffers, but indeed to feed those insatiate *Vultures* that promote such unreasonable Prosecutions. But since you have taught me so much of the *Antiquity* and *Excellency* of Juries, I cannot but crave the continuance of your Favour, to acquaint me somewhat more particularly of their *Office* and *Power* by Law.

Barr. I shall gladly comply with so reasonable and just a Request. * *A Jury of twelve Men are*

* See *Coke*, 4th Part of *Instit.* fol. 84.

by our Laws the only proper Judges of the Matter in Issue before them. As for instance,

1. That Testimony which is delivered to induce a Jury to believe, or not to believe the Matter of Fact in Issue, is called in Law EVIDENCE, because thereby the Jury may, out of many Matters of Fact, *Evidere veritatem*; that is, *see clearly the Truth*, of which they are proper Judges.

2. When any Matter is sworn, Deed read, or offered, whether it shall be believed or not, or whether it be *true or false* in point of Fact, the Jurors are proper Judges.

3. Whether such an Act was done in such or such a manner, or to such or such an *Intent*, the Jurors are Judges. For the Court is not Judge of these Matters, which are Evidence to prove or disprove the thing in Issue. And therefore the Witnesses are always ordered to *direct their Speech to the Jury*, they being the proper Judges of their Testimony. And in all Pleas of the Crown (or Matters Criminal) the Prisoner is said *to put himself for Trial upon his Country*, which is explained and referred by the Clerk of the Court to be meant of the Jury, saying to them, *Which Country you are*.

Jurym. Well then, what is the Part of the King's Justices, or the Court? what are they to take cognizance of, or do, in the Trials of Mens Lives, Liberties, and Properties?

Barr. Their Office in general is to do *equal Justice* and Right: particularly,

1. To

1. To see that the Jury be regularly *returned* and duly *sworn*.

2. To see that the Prisoner (in Cases where 'tis permittable) be allowed his lawful *Challenges*.

3. To advise by Law, whether such Matter may be given in Evidence or not, such a Writing read or not, or such a Man admitted to be a Witness, &c.

4. Because by their *Learning* and Experience they are presumed to be best qualified to ask pertinent Questions, and in the most perspicuous manner soonest to sift out Truth from amongst tedious impertinent Circumstances and Tautologies; they therefore commonly *examine the Witnesses in the Court*, yet not *excluding the Jury*, who of Right *may*, and, where they see Cause, *ought* to ask them any necessary Questions; which undoubtedly they may lawfully do with Modesty and Discretion, without *begging any leave*. For if asking Leave be necessary, it implies in the Court a Right when they list to *deny* it; and how then shall the Jury know the Truth? And since we see that Council, who too often (— *Pudet hac opprobria nobis*) for their *Fees* strive only to baffle Witnesses, and stifle Truth, take upon them daily to *interrogate* the Evidence, it is absurd to think that the Jurors should not have the *same Privilege*, who are upon their *Oaths*, and *proper Judges* of the Matter.

5. As

5: As a discreet and *lawful Assistant* to the Jury, * they do often recapitulate and sum up the Heads of the Evidence; but the Jurors are still to consider whether it be done *truly, fully, and impartially*, (for one Man's *Memory* may sooner fail than *Twelve's*.) He may likewise state the Law to them, that is, deliver his *Opinion* where the Case is difficult, or they *desire* it. But since *ex facto jus oritur*, all Matter of Law arises out of Matter of Fact, so that till the Fact is *settled* there is no room for Law; therefore all such *Discourses* of a Judge to a Jury are or ought to be *Hypothetical*, not *Coercive*; conditional, and not *positive*: viz. *If you find the Fact thus or thus* (still leaving the Jury at liberty to find as they see cause) *then you are to find for the Plaintiff. But if you find the Fact thus or thus, then you are to find for the Defendant, or the like, Guilty, or Not Guilty, in Cases Criminal.*

Lastly, They are to *take the Verdict* of the Jury, and thereupon to give *Judgment* according to Law. For the Office of a Judge (as *Coke* well observes) is *jus dicere*, not *jus dare*; not to make any Law by Strains of Wit, or forced Interpretations; but plainly and impartially to declare the Law already established. Nor can they refuse to accept the Jury's Verdict when agreed: For if they should, and force the Jury to return, and any of them should miscarry for want of Accommodation, it would

* *Vaughan's Reports in Bushell's Case, fol. 144.*

undoubtedly be Murther; and in such Case the Jury may without Crime force their Liberty, because they are illegally confined, having given in their Verdict, and thereby honestly discharged their Office, and are not to be starved for any Man's Pleasure.

Jurym. But I have been told, That a Jury is only Judge of naked *Matter of Fact*, and are not at all to take upon them to *meddle with*, or regard *Matter of Law*, but leave it wholly to the Court.

Barr. 'Tis most true, Jurors are *Judges* of Matters of Fact; that is their *proper Province*, their chief Business; but yet not *excluding* the Consideration of Matter of Law, as it *arises* out of, or is *complicated* with, and *influences* the Fact. For to say, they are not at all to meddle with, or have respect to Law in giving their Verdicts, is not only a *false* Position, and contradicted by every day's *Experience*; but also a very *dangerous and pernicious* one, tending to defeat the principal End of the Institution of *Juries*, and so subtilly to *undermine* that which was *too strong* to be *battered down*.

1. *It is false*: For though the Direction, as to Matter of Law separately, may belong to the Judge, and the finding the Matter of Fact does peculiarly belong to the Jury; yet must your Jury also *apply Matter of Fact and Law together*; and from their Consideration of, and a right Judgment upon both, bring forth their Verdict: For do we not see in most General Issues, as upon
Not

Not Guilty, pleaded in *Trespass*, Breach of the Peace, or *Felony*, though it be Matter in Law whether the Party be a *Trespasser*, a Breaker of the Peace, or a *Felon*; yet the Jury do not find the *Fact* of the Case by itself, leaving the Law to the Court; but find the Party *guilty*, or *not guilty* generally? So as though they answer not to the Question singly, *what is Law*? yet they determine the Law in all Matters where Issue is joined. So likewise is it not every Day's practice, that when Persons are indicted for *Murther*, the Jury does not only find them *guilty* or *not guilty*, but many times, upon hearing and weighing of Circumstances, brings them in, either *guilty* of *Murther*, *Manslaughter*, *per Infortunitas*, or *se defendendo*, as they see Cause? Now do they not herein *complicatedly resolve* both Law and Fact? And to what end is it, that when any Person is prosecuted upon any *Statute*, the Statute itself is usually read to the Jurors, but only that they *may judge*, whether or no the Matter be within that Statute? But to put the Business out of doubt, we have the *Suffrage* of that Oracle of Law, *Littleton*, who in his *Tenures*, Sect. 368. declares, *That if a Jury will take upon them the knowledge of the Law upon the Matter, they may*. Which is agreed to likewise by *Coke* in his Comment thereupon. And therefore it is *false* to say, That the Jury hath not power, or doth not use frequently to apply the Fact to the Law; and thence taking their Mea-

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sures

juries, judge of, and determine the *Crime* or *Issue* by their Verdict.

2. As *Juries* have ever been *vested* with such *Power* by Law, so to exclude them from, or *disseize* them of the same, were utterly to *defeat the End of their Institution*. For then, if a Person should be indicted for doing any common innocent Act, if it be but cloathed and disguised in the Indictment with the Name of Treason, or some other high Crime, and proved by Witnesses to have been done by him; the Jury, though satisfied in Conscience, that the Fact is not any such Offence as it is called, yet because (according to this fond Opinion) they have no Power to judge of *Law*, and the *Fact* charged is fully *proved*, they should at this rate be bound to find him *guilty*: And being so found, the Judge may pronounce Sentence against him, for he finds him a convicted Traitor, &c. by his Peers. And thus as a certain Physician boasted, That he had *killed one of his Patients with the best Method in the World*; so here should we have an *innocent* Man hang'd, drawn, and quartered, and all *according to Law*.

Jurym. God forbid that any such thing should be practised! and indeed I do not very fully understand you.

Barr. I do not say it ever hath been, and I hope it never *will be* practised: But this I will say, that according to this Doctrine, it *may be*; and consequently *Juries* may thereby
be

be rendered rather a *Snare* or Engine of Oppression, than any Advantage or *Guardian* of our legal Liberties against arbitrary Injustice, and made mere *Properties* to do the *drudgery*, and bear the *blame* of unreasonable *Prosecutions*. And since you seem so dull as not to perceive it, let us put an imaginary Case, not in the least to abet any Irreverence towards his Majesty, but only to explain the Thing, and shew the Absurdness of this Opinion.——Suppose then a Man should be indicted, *For that he as a false Traitor, not having the Fear of God before his Eyes, &c. did traitorously, presumptuously, against his Allegiance, and with an intent to affront his Majesty's Person and Government, pass by such or such a Royal Statue or Effigies with his Hat on his Head, to the great Contempt of his Majesty and his Authority, the evil Example of others, against the Peace, and his Majesty's Crown and Dignity.* Being hereupon arraigned, and having pleaded *Not Guilty*, suppose that sufficient Evidence should swear the Matter of Fact laid in the Indictment, viz. *That he did pass by the Statue or Picture with his Hat on;* now imagine yourself one of the Jury that were sworn to try him, What would you do in the Matter?

Jurym. Do? Why I should be satisfied in my Conscience, That the Man had not herein committed *any Crime*, and so I would bring him in *not guilty*.

Barr. You *ſpeak* as any honeſt Man would do: But I hope you have not forgot *the Point* we were upon. Suppoſe therefore when you thought to do thus, the Court, or one of your Brethren, ſhould take you up and tell you, That it was out of your Power ſo to do: For look ye (ſaith he) my Maſters! we Jurymen are only to find Matter of Faſt, which being fully proved, as in this Caſe before us it is, we muſt find the Party guilty: whether the Thing be Treason or not, does not belong to us to enquire; it is ſaid ſo here, you ſee, in the indictment; and let the Court look to that, they know beſt, we are not Judges of Law: Shall we meddle with Nicities and Punctilio's, and go contrary to the Directions of the Court? So perhaps we ſhall bring ourſelves into a Præmunire (as they ſay) and perhaps never be ſuffered to be Jurymen again. No, no, the Matter of Faſt you ſee is proved, and that is our Buſineſs; we muſt go according to our Evidence, we cannot do leſs: truly it is ſomething hard, and I pity the poor Man, but we cannot help it, &c. After theſe notable Documents, what would you do now?

Jurym. I ſhould not tell what to ſay to it; for I have head ſeveral ancient Jurymen ſpeak to the very ſame effect, and thought they talked very wiſely.

Barr. Well then, would you conſent to bring in the Man guilty?

Jurm. Truly I ſhould be ſomewhat unwilling to do it; but I do not ſee which way it can be avoided,

avoided, but that he *must be found guilty of the Fact*.

Barr. God keep every honest body from *such Jurymen!* have you no more regard to your *Oath?* to your *Conscience?* to *Justice?* to the *Life of a Man?*

Jurym. Hold! hold! perhaps we would not bring him in *guilty generally*, but only *guilty of the Fact*, finding no more but *guilty of passing by the Statue with his Hat on*.

Barr. This but poorly mends the Matter, and signifies little or nothing: For such a finding hath generally been *refused* by the Court, as being *no Verdict*; though it is said it was lately allowed somewhere in a *Case that required Favour*. But suppose it were accepted, what do you intend should become of the Prisoner? Must not he be kept in Prison till all the Judges are at leisure and willing to meet and *argue the Business?* Ought you not, and what Reason can you give why you should not, absolutely acquit and discharge him? Nay, I do aver, you are bound by your Oaths to do it, by saying with your *Mouths* to the Court, what your *Consciences* cannot but dictate to yourselves, *Not Guilty*: For pray consider, are you not sworn, *That you will well and truly try, and true Deliverance make?* There is none of this Story of *Matter of Fact* distinguished from Law in your Oath. But you are, *well*, that is, *fully and truly*, that is, *impartially*, to try

try the Prisoner. So that if upon your Consciences, and the best of your *Understanding*, by what is proved against him, you find he is guilty of that *Crime* wherewith he stands charged, that is, deserving *Death*, or such *other Punishment* as the Law inflicts upon an Offence so *denominated*; then you are to say, he is *Guilty*. But if you are not satisfied, that either the *Act* he has committed was Treason, or other *Crime*, (though it be never so often *called so*) or that the *Act* itself, if it were so criminal, was not *done*; then what remains but that you are to acquit him? For the End of Juries is to preserve Men from *Oppression*, which may happen as well by *imposing* or ruining them for that *as a Crime*, which indeed is *none*, or at least not such or so *great* as is pretended; as by charging them with the Commission of that, which in truth was *not committed*. And how do you *well and truly Try*, and *true Deliverance make*, when indeed you do but deliver him up to others to be *condemned*, for that which yourselves do not believe to be any *Crime*?

Jurym. Well; but the *supposed Case* is a Case *unsupposable*. It is not to be imagined, that any such thing should happen, nor to be thought, that the Judges will condemn any Man, though brought in guilty by the Jury, if the Matter in itself be not so *criminal* by Law.

Barr.

Barr. It is most true, I do not believe that ever *that Case* will happen. I put it in a thing of apparant *absurdity*, that you might the more clearly observe the unreasonableness of this Doctrine; but withal I must tell you, That it is not impossible that some *other Cases* may really happen, of the same or the *like nature*, though more *fine* and plausible. And though we apprehend not, that during the Reign of his Majesty that now is, (*whose Life God long preserve*) any Judges will be made that would so *wrest the Law*; yet what Security is there, but that some *Successors* may not be so cautious in their Choice? And though our *Benches* of Judicature be at present furnished with Gentlemen of great Integrity, yet there may one day happen some *Tresilian*, or Kinsman of *Empson's*, to get in, (for what *has been*, may be) who, *Empson-like* too, shall pretend it to be for his Master's Service to encreate the number of Criminals, that his Coffers may be *filled* with *Fines* and *Forfeitures*: And then such Mischiefs may arise. And Juries having upon confidence parted with their just Privileges, shall *then, too late*, strive to re-assume them, when the number of ill Precedents shall be vouched to enforce that as of *Right*, which in truth was at first a *Wrong* grounded on *Easiness* and *Ignorance*. Had our *wise and wary* Ancestors thought fit to depend so far upon the *contingent Honesty* of Judges, they needed not to have
been

been so *zealous* to continue the Usage of *Juries*.

Jury. Yet still I have heard, that in every Indictment, or Information, there is always something of *Form* or Law; and something else of *Fact*; and it seems reasonable, that the Jury should not be bound up *nice*ly to find every *Formality* therein expressed, or else to acquit (perhaps) a notorious Criminal. But if they find the *essential Matter* of the Crime, then they ought to find him guilty.

Barr. You say *true*, and therefore must note, that there is a *wide difference* to be made between *Words of Course*, raised by Implication of Law, and *essential Words*, that either *make* or really *aggravate* the Crime charged. The Law does suppose and imply every Trespass, Breach of the Peace, every Felony, Murder, or Treason, to be done *Vi & Armis*, with Force and Arms, &c. Now if a Person be indicted for Murder by *Poison*, and the Matter proved, God forbid the Jury should scruple the finding him *Guilty* upon the indictment, merely because they do not find that part of it, as to *Force and Arms*, proved! For that is implied as a necessary or allowable *Fiction* of Law.

But on the other side, when the Matter in Issue in itself, and taken as a naked Proposition, is of such a Nature, as no Action, Indictment, or *Information* will lie for it *singly*,
but

but it is *worked up* by special Aggravations into Matter of *Damage* or *Crime*; as that it was done to *scandalize the Government*, to *raise Sedition*, to *affront Authority*, or the like, or with such or such an *evil Intent*: If these Aggravations, or some *overt Act* to manifest such ill Design or Intention be not made out by *Evidence*, then ought the Jury to find the Party *Not Guilty*. For Example,

Bishop *Latimer* (afterwards a *Martyr* in bloody *Queen Mary's* Days, for the *Protestant Religion*) in his Sermon preached before the most excellent King *Edward* the Sixth, delivered these Words: “ I must desire your Grace
 “ to hear poor Mens Suits yourself; the Saying
 “ is now, That Money is heard every where;
 “ if he be Rich, he shall soon have an End of
 “ his Matter, others are feign to go home with
 “ weeping Tears for any help they can obtain
 “ at any Judge's Hand. Hear Mens Suits your-
 “ self, I require you in God's Behalf, and put
 “ them not to the hearing of those Velvet
 “ Coats, these Up-skips. Amongst all others,
 “ one especially moved me at this time to
 “ speak: This it is, Sir: A Gentlewoman
 “ came and told me, that a great Man keepeth
 “ certain Lands of hers from her, and will be
 “ her Tenant in spite of her Teeth. And
 “ that in a whole Twelve-month she could
 “ not get but one Day for the Hearing of
 “ her Matter, and the same Day, when it
 E should

“ should be heard, the great Man brought
 “ on his side a great sight of Lawyers for
 “ his Council, the Gentlewoman had but one
 “ Man of Law, and the great Man shakes
 “ him so, that he cannot tell what to do; so
 “ that when the Matter came to the Point,
 “ the Judge was a means to the Gentlewo-
 “ man, that she should let the great Man have
 “ a quietness in her Land: I beseech your
 “ Grace, that you would look to these Matters.
 “ And you proud Judges! Harken what God
 “ saith in his Holy Book; *Audite illos, ita par-*
 “ *vum ut magnum*, Hear them (said he) the
 “ Small as well as the Great, the Poor as well
 “ as the Rich, regard no Person, fear no
 “ Man. And why? *Quia Domini Judicium*
 “ *est*, The Judgment is God’s. Mark this
 “ Saying, thou proud Judge, the Devil will
 “ bring this Sentence against thee at the Day
 “ of Doom. Hell will be full of these Judges,
 “ if they repent not, and amend; they are
 “ worse than the wicked Judge that Christ
 “ speaketh of *Luke* the 19th, that neither
 “ feared God nor the World. Our Judges
 “ are worse than this Judge was; for they
 “ will neither hear Men for God’s sake, nor
 “ fear of the World, nor importunateness, nor
 “ any thing else; yea, some of them will com-
 “ mand them to * Ward if they be importu-

* Prison.

“ nata.

“nate. I heard say, That when a Suiter
 “came to one of them, he said, What Fel-
 “low is it that giveth these Folks Counsel
 “to be so importunate? He deserves to be
 “punished and committed to Ward. Marry,
 “Sir, punish me then, it is even I that gave
 “them Counsel, I would gladly be punished
 “in such a Cause; and, if you amend not, I
 “will cause them to cry out upon you still,
 “even as long as I live.”——These are the
 very Words of that good Bishop and Martyr,
 Father *Latimer*. “But now-a-days the Judges
 “be afraid to hear a Poor Man against the
 “Rich; insomuch, they will either pronounce
 “against him, or so drive off the Poor Man’s
 “Suit, that he shall not be able to go thorough
 “with it*.”

Jurym. Truly they are somewhat *Bold*, but I
 think very *Honest* ones. But what signify they
 to our Discourse?

Barr. Only this; Suppose the Judges of
 those times, thinking themselves aggrieved by
 such his *Freedom*, should have brought an *In-*
dictment against him, setting forth, *that falsely and*
maliciously intending to scandalize the Government
and the Administration of Justice in this Realm,
and bring the same into Contempt, he did speak,
publish, and declare the false and scandalous Words
before recited.

* See also *Latimer’s* Third Sermon.

Jurym. I conceive the Judges had more *Wit*, than to trouble themselves about such a Business.

Barr. That's nothing to the purpose; but suppose, I say, by them, or any body else, it had been *done*, and his *speaking* the *Words* had been proved, and you had then been living and one of the Jury.

Jurym. I would have pronounced him *not Guilty*, and been *starved* to Death before I would have consented to a contrary Verdict, because the Words in themselves are not *Criminal*, nor reflecting upon any Particulars; and as for what is supposed to be laid in the Indictment or Information, that they were published or spoken to *scandalize the Government and the Administration of Justice, or to bring the same into Contempt*, nothing of that appears.

Barr. You resolve, as every honest, understanding, conscientious Man would do in the like Case; for, when a Man is prosecuted for that which in itself is *no Crime*, how dreadfully soever it may be set out, as the Inquisitors in *Spain* use to clothe innocent Protestants, whom they censure to the Flames, with *Sambenito's* (Garments all over bepainted with *Devils*) that the People beholding them in so Hellish a Dress, may be so far from pitying them, that they may rather condemn them in their Thoughts as *Miscreants* not worthy to live,

live, though in truth they know nothing of their Cause; yet I say, notwithstanding any such *Bugbear Artifices*, an innocent Man ought to be acquitted, and not he and all his Family ruined, and perhaps utterly undone, for *Words* or *Matters* harmless in themselves, and possibly very well intended, but only rendered *Criminal*, by being thus hideously dressed up, and wrested with some far-fetched, forced and odious Construction.

Jurym. This is a matter well worthy the Consideration of all Juries; for indeed I have often wondered to observe the *Adverbs* in Declarations, Indictments, and Informations in some Cases to be harmless *Vinegar and Pepper*, and in others *Henbane steeped in Aqua Fortis*.

Barr. That may easily happen, where the Jury does not *distinguish* legal Implications, from such as constitute, or materially *aggravate* the Crime; for, if the Jury shall honestly refuse to find the *latter* in Cases where there is not direct proof of them, *viz.* That such an Act was done *Falsly, Scandalously, Maliciously*, with an intent to *raise Sedition, defame the Government*, or the like, their Mouths are not to be stopt, nor their Consciences satisfied with the Court's telling them——*You have nothing to do with that, it's only matter of Form or matter of Law, you are only to examine the Fact, whether he spoke such Words, writ or sold such a Book, or the like:* For, now if they

they should ignorantly take this for an Answer, and bring in the Prisoner *Guilty*, though they mean and intend of the *naked Fact* or bare Act only; yet the Clerk recording it demands a further Confirmation, saying to them, thus; *Well then, you say A. B. is Guilty of the Trespass or Misdemeanour in manner and form as he stands Indicted, and so you say all?* To which the Foreman answers for himself and his Fellows, *Yes*. Whereupon the Verdict is drawn up ——— *Juratores super Sacramentum suum dicunt, &c.* The Jurors do say upon their Oaths, that A. B. maliciously, in Contempt of the King and the Government, with an intent to scandalize the Administration of Justice, and to bring the same into Contempt, or to raise Sedition, &c. (as the Words before were laid) spake such Words, published such a Book, or did such an Act, against the Peace of our Lord the King, his Crown and Dignity.

Thus a **Verdict**, so called in Law, *quasi veritatis*, because it ought to be the **Voice** or **Saying** of **Truth** itself, may become composed in its *material* part of *Falshood*. Thus twelve Men ignorantly drop into a *Perjury*. And will not every conscientious Man tremble to pawn his Soul under the sacred and dreadful Solemnity of an Oath, to attest and justify a *Lye upon Record* to all Posterity? besides the wrong done to the Prisoner, who thereby perhaps comes to be *hanged*, (and so the Jury *in foro conscientiae* are certainly guilty of

of his *Murder*; or at least by *Fine* or *Imprisonment* undone, with all his Family, whose just *Curses* will fall heavy on such unjust Jurymen and all their *Posterity*, that against their *Oaths* and *Duty* occasioned their causeless Misery. And is all this, think you, nothing but a matter of *Formality*?

Jurym. Yes, really a matter of *vast Importance* and *sad* Consideration; yet I think you charge the Mischiefs done by such Proceedings a little *too heavy* upon the *Jurors*: Alas, good Men! they *mean no harm*, they do but follow the *Directions* of the Court; if any body ever happen to be to blame in such Cases, it must be the *Judges*.

Barr. Yes, forsooth! That's the Jurymen's *common Plea*; but do you think it will hold good in the Court of Heaven? 'Tis not enough that we *mean no harm*, but we must *do none neither*, especially in things of that moment; nor will *Ignorance* excuse, where it is *affected*, and where *Duty* obliges us to *inform* ourselves better, and where the matter is so *plain* and easy to be understood.

As for the *Judges*, they have a fairer *Plea* than you, and may quickly return the *Burthen* back upon the *Jurors*: for *we*, may they say, *did nothing but our Duty, according to usual Practice, the Jury his Peers had found the Fellow Guilty upon their Oaths of such an odious Crime, and attended with such vile Presumptions, and dangerous Circumstances. They are Judges, we*
took

took him as they presented him to us, and according to our Duty pronounced the Sentence, that the Law inflicts in such Cases, or set a Fine, or ordered Corporal Punishment upon him, which was very moderate, considering the Crime laid in the Indictment or Information, and of which they had so sworn him Guilty; if he were innocent, or not so bad as represented, let his Destruction lie upon the Jury, &c. At this rate, if ever we should have an unconsconable Judge, might he argue; and thus the Guilt of the Blood or Ruin of an Innocent Man, when it is too late, shall be bandied to and fro; and shuffled off from the Jury to the Judge, and from the Judge to the Jury, but really sticks fast to both, but especially on the Jurors; because the very End of their Institution was to prevent all dangers of such Oppression; and in every such Case, they do not only wrong their own Souls, and irreparably injure a particular Person, but also basely betray the Liberties of their Country in general: For as without their ill Compliance and Act no such Mischief can happen; so by it, ill Precedents are made, and the Plague is increased, honest Juries are disheartened or seduced by Custom from their Duties, just Privileges are lost by disuse, and perhaps within a while some of themselves may have an hole pickt in their Coats, and then they are tried by another Jury just as wise and honest, and so deservedly come to smart under the ruin-

ruinating *Effects* and *Example* of their own Folly and Injustice.

Jurym. You talk of *Folly*, and blame *Jury-men*, when indeed they cannot help it; they would sometimes find such a Person *Guilty*, and such an one *Innocent*, and are persuaded they *ought so to do*, but the Court over-rules, and *forces* them to do otherwise.

Barr. How, I pray?

Jurym. How? Why, did you never hear a *Jury threatened to be Fined and Imprisoned*, if they did not comply with the Sentiments of the Court?

Barr. I have read of such doings, but I never heard, or saw it done; and indeed I do not doubt but our *Seats* of Justice are furnished with both *better Men*, and *better Lawyers*, than to use any such *Menaces* or *Duress*; for undoubtedly it is a base and very *illegal Practice*. But, however, will any Man that *fears God*, nay, that is but an *honest Heathen*, debauch his *Conscience*, and forswear himself, do his Neighbour *Injustice*, betray his Country's Liberties, and consequently *enslave* himself and his *Posterity*, and all this merely because he is *beckoned* and threatened a little?

Jurym. I know it should not sway with any; but, alas, a *Prison* is terrible to most Men, whatever the *Cause* be; and the *Fine* may be such, if one shall refuse to comply, as may utterly ruin one's Family.

Barr. Fright not yourself, there is no Cause for this *Ague-Fit*, to shake your Conscience out of Frame; if you are threatned, it is but *Brutum Fulmen*, Lightning without a Thunderbolt, nothing but *big Words*; for it is well known, **That there is never a Judge in England that can Fine or Imprison any Jurymen in such a Case.**

Jurym. Good Sir! I am half ashamed to hear a *Barrister* talk thus; have not some in our Memory been *fined* and imprisoned? And sure that which has *actually* been done, is not altogether *Impossible*.

Barr. Your Servant, Sir! Under favour of your mighty Wisdom and Experience, when I said no Judge *could do it*, I spake the more like a *Barrister*; for it is a Maxim in Law—*Id possumus, quod Jure possumus*. A Man is said to be *Able* to do only so much, as he may *Lawfully do*. But such *Fining* and *Imprisoning* cannot *Lawfully* be done; the Judges have no *Right or Power* by Law to do it, and therefore it may well be said, they *cannot* or are *not able* to do it.

And whereas you say, that some *Juries* in our Memory have been *fined* and imprisoned, you may possibly say true; but it is as true, that it hath been only in our Memory, for no such thing was practised in antient times; for so I find it asserted by a late learned Judge*, in these positive Words: *No Case*

* Lord Chief Justice *Vaughan*, in his Reports, Fol. 146.

can be offered, either before *Attaints* granted in General, or after, that ever a Jury was punished by Fine and Imprisonment by any Judge, for not finding according to their Evidence and his Direction, until Popham's time; nor is there clear proof, that he ever Fined them for that Reason, separated from other Misdemeanours. And Fol. 152, he affirms,—That no Man can shew, that a Jury was ever punished upon an Information, either at Law, or in the Star-Chamber, where the Charge was only for finding against their Evidence, or giving an untrue Verdict, unless *Imbracery*, *Subornation*, or the like were joined. So that, you see, the Attempt is an Innovation as well as unjust, a thing unknown to our Forefathers and the antient Sages of the Law; and therefore so much the more to be watched against, resisted, and suppressed, whilst young, lest in time this crafty Cockatrice's Egg, hatched and fostered by Ignorance and pusillanimous Compliance, grow up into a Serpent too big to be mastered, and so blast and destroy the First-Born of our English Freedoms. And indeed (blessed be God) it hath hitherto been rigorously opposed as often as it durst crawl abroad, being condemned in Parliament, and knocked o' th' head by the Resolutions of the Judges upon solemn Argument: As by and by I shall demonstrate.

Jurym. Well, but are Jurors not liable then to Fine or Imprisonment, in any Case whatsoever?

Barr. Now you run from the Point; we were talking of giving their Verdict, and you speak of any Case whatsoever. Whereas you should herein observe a necessary distinction, which I shall give you in the Words of that learned Judge last recited *: *Much of the Office of Jurors, in order to their Verdict, is Ministerial; as not withdrawing from their Fellows after they are sworn; not receiving from either side Evidence not given in Court; not eating and drinking before their Verdict; refusing to give a Verdict, &c. Wherein if they transgress, they may be finable. But the Verdict itself, when given, is not an Act Ministerial, but Judicial, and (supposed to be) according to the best of their Judgment; for which they are not Finable, nor to be punished but by Attaint: that is, by another Jury, in Cases where an Attaint lies, and where it shall be found that Wilfully they gave a Verdict False and Corrupt.*

Now that Juries otherwise are, in no Case punishable, nor can (for giving their Verdict according to their Consciences and the best of their Judgment) be legally Fined or Imprisoned by any Judge, on colour of not going according to their Evidence, or finding contrary to the Directions of the Court, is a Truth both founded on unanswerable Reasons, and confirmed by irrefragable Authorities.

Jurym. Those I would gladly hear.

* *Vaughan's Reports*, Fol. 152.

Barr.

Barr. They are *many*, but some of the most evident are these that follow.

As for Reasons :

1. A Jury ought not to be Fined or Imprisoned because they do not follow the Judge's Directions ; for if they do follow his Directions, they may yet be Attainted : and to say they gave their Verdict according to his Directions is no Barr, but the Judgment shall be *reversed*, and they *punished* for doing that, which if they had not done, they should (by this Opinion) have been Fined and Imprisoned by the Judge, — Which is *Unreasonable*.

2. If they *do not follow* his Direction, and be therefore *Fined*, yet they may be *Attainted*, and so they should be *doubly* punished by distinct Judicatures for the same Offence, which the Common Law never admits.

3. To what end is the Jury to be returned out of the *Vicinage* (that is, *the Neighbourhood*) whence the Issue ariseth ? To what end must *Hundredors* be of the Jury, whom the Law supposeth to have nearer Knowledge of the Fact than those of the Vicinage in general ? To what end are they *challenged* so scrupulously to the *Array* and *Pole* ? To what end must they have such a certain *Freehold*, and be *probi & legales homines*, and not of *Affinity* with the Parties concerned, &c. if after all this they *implicitly* must give a Verdict by the Dictates and Authority of another Man, under pain of *Fines* and *Imprisonment*, when sworn to do it
according

according to the best of their *own Knowledge* ? A Man cannot see by another's Eye, nor hear by *another's Ear*, no more can a Man conclude or *infer* the thing to be resolved by *another's* Understanding or Reasoning, unless all Mens Understandings were equally alike. And if meerly in compliance, because the Judge *says thus or thus*, a Jury shall give a Verdict, tho' such their Verdict should happen to be *right*, true, and just, yet they, being not assured *it is so* from their own Understanding, are *forsworn*, at least in *Foro Conscientiae*.

4. Were Jurors so finable, then every Mayor and Bailiff of Corporations, all Stewards of Leets, Justices of Peace, &c. whatever Matters are try'd before them, shall have *Verdicts* to *their Minds*, or else Fine and Imprison the Jurors till they *have*; so that such must be either pleased, humoured, or gratified, else no Justice or Right can be had in any Court.

5. Whereas a Person by Law may *challenge* the Sheriff or any Juryman, if of Kin to his Adversary, yet he cannot challenge a Mayor, Recorder, Justice, &c. who 'tis possible will have a Verdict for their *Kinsman*, or against their *Enemy*, or else fine and imprison the Jury till they have obtained it: so that by this means our Lives, Liberties, and Properties shall be solely tried by, and remain at the arbitrary Disposal of every mercenary or corrupted *Justice*, Mayor, Bailiff, or Recorder, if any such should at any time get into *Office*.

6. 'Tis

6. 'Tis unreasonable that a Jury should be Finable on pretence of their going *against their Evidence*, because it can never be *Tried* whether or no in Truth they did find with or against their Evidence, by reason no *Writ of Error* lies in the Case.

7. Were Jurymen liable to such arbitrary Fines, they should be in a *worse Condition* than the Criminals that are tryed by them; for in all Civil Actions, Informations, and Indictments, some Appeals, or Writs of false Judgment, or of Error, do lie into *Superior Courts* to try the regular Proceedings of the Inferior. But here can be no After-Trial or Examination, but the Juryman (if Fining at all were *lawful*) must either pay the Fine, or lie by it, *without Remedy*, to decide whether in his particular Case he were legally fined or not.

8. Without a Fact agreed, it is as impossible for a Judge or any other to *know the Law*, relating to that Fact, or *direct* concerning it, as to know an Accident that hath no Subject; for as where there is *no Law*, *there is no Transgression*, so where there is *no Transgression*, *there is no place for Law*: for the Law (saith Divine Authority) *is made for the Transgressor*. And as Coke tells us, *Ex Facto Jus oritur*, upon stating the Fact or Transgression, Matter of Law doth arise, or grow out of the Root of the Fact. Now the Jury being the *sole Judges of Fact*, and Matter in Issue before them, not finding the Fact on which the Law should arise,

arise, cannot be said to find *against Law*, which is no other than a Superstructure on Fact; so that to say they have found against the Law, when *no Fact* is found, is absurd; an Expression insignificant and unintelligible: for no *Issue* can be joined of Matter in Law, no *Jury* can be *charged* with the Trial of Matter in Law barely, no *Evidence* ever was or can be given to a Jury of what is Law or not. Nor can any such Oath be given to, or taken by a Jury to try Matter in Law, nor does an Attaint for such Oath, if false, &c. But if by *finding against the Directions of the Court in Matter of Law*, shall be understood, that if the Judge, having heard the Evidence given in Court, (for he can regularly know no other, though the Jury may) shall tell the Jury upon this Evidence, the *Law is for the Plaintiff, or for the Defendant*, and the Jury are under pain of Fine and Imprisonment to *find* accordingly; then 'tis plain the Jury ought of *Duty* so to do. Now, if this were *true*, who sees not that the Jury is but a troublesome *Delay*, of great *Charge*, much *Formality*, and no real *Use* in determining Right and Wrong, but meer *Echoes* to sound back the Pleasure of the Court; and consequently that Trials by them might be better *abolished* than continued? Which is at once to spit Folly in the Faces of our venerable Ancestors, and enslave our Posterity.

9. As the Judge can *never direct what the Law is* in any Matter controverted, without
first

first knowing the Fact, so he cannot possibly know the Fact but from the *Evidence* which the Jury have ; but he can never *fully* know what Evidence they have, for besides what is sworn in Court, (which is all that the Judge can know) the Jury being of the *Neighbourhood*, may and oft-times *do know* something of their own knowledge, as to the Matter itself, the Credit of the Evidence, &c. which may justly *sway* them in delivering their Verdict, and which Self-knowledge of theirs is so far *countenanted* by Law, that it supposes them capable thereby to *try* the Matter in Issue, (and so they must) though *no Evidence* were given on either side in Court. As when any Man is indicted, and no Evidence comes against him, the Direction of the Court always is, *You are to acquit him, unless of your own Knowledge you know him Guilty* ; so that even in that Case they may find him Guilty without any Witnesses. Now how absurd is it to think, that any Judge has power to *fine* a Jury for going against their Evidence, when he that so fineth knoweth perhaps nothing of their *Evidence* at all, (as in the last Case) or at least but some *part* of it ? For how is it possible he should lawfully punish them for that which it is impossible for him to know ?

Lastly, is any thing more common, than for two Lawyers or Judges to deduce *contrary* and opposite conclusions out of the *same Case* in Law ? And why then may not two Men infer distinct Conclusions from the same *Testimony* ?

money? And consequently may not the *Judge* and *Jury* honestly differ in their Opinion or Result from the Evidence, as well as two Judges may, which often happens? And shall the *Jurymen* meerer for this difference of Apprehension merit Fine and Imprisonment, because they do that which they cannot otherwise do, preserving their *Oath* and *Integrity*? especially when by Law they are presumed to know *better* and much *more* of the Business, than the Judge does as aforesaid.

Are not all these gross contradicting Absurdities, and unworthy (by any Man that deserves a *Gown*) to be put upon the *Law of England*, which has ever own'd *Right Reason* for its Parent, and dutifully submitted to be *guided* thereby?

Jurym. If the *Law*, as you say, be *Reason*, then undoubtedly this Practice of *Fining of Juries* is most *Illegal*, since there cannot be any thing more *unreasonable*: But what *Authorities* have you against it?

Barr. You have heard it proved to be a *modern* up-start Encroachment, so you cannot expect any direct or express Condemnation of it in Antient Times, because the thing was not then *set on foot*. And by the way, though *Negative Arguments* are not necessarily conclusive, yet that we meet with no *Precedents* of old of Juries fined, for giving their Verdict contrary to Evidence, or the Sense of the Court, is a violent Presumption that it ought not to be

be done: for it cannot be supposed, that this latter Age did *first of all discover*, that Verdicts were many times not according to the Judges Opinion and *Liking*. Undoubtedly they saw *that* as well as we; but knowing the same not to be any Crime, or *punishable* by Law, were so *Modest* and *Honest* as not to meddle with it. However, what Entertainment it hath met with when attempted in *our Times*, I shall shew you in two remarkable Cases.

1. When the late Lord Chief Justice *Keeling* had attempted something of that kind, it was complained of, and highly resented by the then *Parliament*; as appears by this Copy of their *Proceedings* thereupon, taken out of their *Journal*, as follows:

Die Mercurii, 11 Decembris, 1667.

‘ The House resumed the Hearing of the
 ‘ rest of the Report touching the matter of *Re-*
 ‘ *straint upon Juries*, and *that* upon the Exami-
 ‘ nation of divers Witnesses in several Cases of
 ‘ Restraints put upon Juries by the Lord Chief
 ‘ Justice *Keeling*; and thereupon resolved as
 ‘ followeth:

‘ First, That the Proceedings of the said
 ‘ Lord Chief Justice in the Cases now reported
 ‘ are *Innovations* in the Trial of Men for their
 ‘ Lives and Liberties. And that he hath used
 ‘ an *arbitrary* and *illegal* Power, which is of
 ‘ dangerous Consequence to the Lives and Li-
 ‘ berties of the People of *England*, and tends

‘ to the introducing of an *arbitrary* Govern-
 ‘ ment.

‘ Secondly, That in the Place of Judicature
 ‘ the Lord Chief Justice hath undervalued, vi-
 ‘ lified, and contemned *Magna Charta*, the
 ‘ great *Preserver* of our Lives, Freedom, and
 ‘ Property.

‘ Thirdly, That he be brought to *Trial* in
 ‘ order to condign *Punishment*, in such Man-
 ‘ ner as the House shall judge most fit and re-
 ‘ quisite.’

Die Veneris, 13 Decembris, 1667.

‘ Resolved, &c.

‘ That the Precedents and Practice of *fining*
 ‘ or *imprisoning* of Jurors for giving their Ver-
 ‘ dicts, are *illegal*.’

Here you see it *branded* in *Parliament*: Next
 you shall see it formally condemned on a solemn
 Argument by the *Judges*. The Case thus.

At the Sessions for *London*, Sept. 1670. *Wil-*
liam Pen, and *William Mead* (two of the Peo-
 ple commonly called *Quakers*) were indicted,
 for that they with others, to the number of
 three hundred, on the 14th Aug. 22 *Regis*, in
Gracechurch-street, did with Force and Arms,
 &c. unlawfully and tumultuously assemble and
 congregate themselves together, to the disturb-
 ance of the Peace; and that the said *Wil-*
liam Pen did there preach and speak to the
 said *Mead* and other Persons in the open
 Street;

Street; by reason whereof, a great Concourse and *Tumult* of People in the Street aforesaid then and there a long time did remain and continue, in contempt of our said Lord the King, and of his Law, to the great *Disturbance* of his Peace, to the great *Terror* and disturbance of many of his Liege People and Subjects, to the ill Example of all others in the like Case Offenders, and against the Peace of our said Lord the King, his Crown and Dignity.

The Prisoners pleading *not guilty*, it was proved, that there *was a Meeting* at the time in the Indictment mentioned, in *Gracechurch-Street*, consisting of three or four hundred People, in the open Street; that *William Pen* was *speaking or preaching* to them, but *what* he said, the Witnesses (who were Officers and Soldiers sent to disperse them) could not *bear*.—This was the Effect of the Evidence; which Sir *John Howel*, the then Recorder, (as I find in the *Print* of that Trial) was pleased to sum up to the Jury, in these Words:

‘ You have heard what the Indictment is, it
 ‘ is for preaching to the People in the Street,
 ‘ and drawing a tumultuous Company after
 ‘ them, and Mr. *Pen* was speaking; if they
 ‘ should not be disturbed, you see they will
 ‘ go on, there are three or four Witnesses
 ‘ that have proved this, that he did preach
 ‘ there, that Mr. *Mead* did allow of it. Af-
 ‘ ter this you have heard by substantial Wit-
 ‘ nesses what is said against them; **Now we**
 ‘ are

' are upon the Matter of Fact, which you
' are to keep to, and observe, as what
' hath been fully sworn, at your Persl.'

This Trial begun on the *Saturday*; the Jury retiring, after some considerable time spent in debate, came in, and gave this Verdict,—— *Guilty of speaking in Gracechurch-Street*. At which the Court was offended, and told them, *they had as good say nothing*; adding, — *Was it not an unlawful Assembly? You mean he was speaking to a Tumult of People there?* But the Foreman saying, what he had delivered was *all* he had in Commission, and others of them affirming, That they allowed of no such Word as an *unlawful Assembly* in their Verdict, they were sent back again, and then brought in a Verdict in Writing, subscribed with all their Hands, in these Words:

We the Jurors hereafter named do find William Pen to be guilty of speaking or preaching to an Assembly met together in Gracechurch-Street, the 14th of Aug. 1670. And William Mead not guilty of the said Indictment.

* This the Court repented still worse, and therefore sent them back again, and adjourned

* *Note*, Though this Jury, for their excellent Example of Courage and Constancy, deserve the Commendation of every good *Englishman*; yet if they had been better advised, they might have brought the Prisoners in *Not Guilty* at first, and saved themselves the Trouble and Inconveniencies of these two Nights Restraint. See *State-Trials*, Vol. II. p. 606. in fol.

till

till *Sunday Morning*; but then too they insisted on the same Verdict: so the Court adjourned till *Monday Morning*; and then the Jury brought in the Prisoners generally *Not Guilty*; which was recorded, and allowed of. But immediately the Court fined them *forty Marks* a Man, and to lie in Prison till paid.

Being thus in *Custody*, *Edw. Busbel*, one of the said Jurors, on the ninth of *November* following brought his *Habeas Corpus* in the Court of *Common-Pleas*. On which the Sheriffs of *London* made Return, ‘ That he was detained by virtue
 ‘ of an Order of Sessions, whereby a Fine of
 ‘ forty Marks was set upon him and eleven
 ‘ others particularly named, and every of them
 ‘ being Jurors sworn to try the Issues joined be-
 ‘ tween the King and *Pen* and *Mead*, for cer-
 ‘ tain Trespasses, Contempts, unlawful Assem-
 ‘ blies and Tumults, and who then and there
 ‘ did acquit the said *Pen* and *Mead* of the same,
 ‘ against the Law of this Kingdom, and against
 ‘ full and manifest Evidence, and against the Di-
 ‘ rection of the Court in Matter of Law, of and
 ‘ upon the Premises openly in Court to them
 ‘ given and declared; and that it was ordered
 ‘ they should be imprisoned till they severally
 ‘ paid the said Fine, which the said *Busbel* not
 ‘ having done, the same was the Cause of his
 ‘ Caption and Detention *.’

* See *Busbel's Case*, in *Vaughan's Reports*, at large.

The Court coming to debate the *Validity* of this *Return*, adjudged the same *insufficient*: for,

1. The Words,——*against full and manifest Evidence*, was too general a Clause: the Evidence should have been *fully* and particularly recited; else how shall the Court know it was *so full and evident*? they have now only the Judgment of the *Sessions* for it, that it was so: but said the Judges, *Our Judgments ought to be grounded upon our own Inferences and Understandings, and not upon theirs.*

2. It is not said, that they acquitted the Persons indicted against full and manifest Evidence, *corruptly and knowing the said Evidence to be full and manifest*, for otherwise it can be no Crime: for that may seem *full and manifest* to the Court, which does not appear so to the Jury.

3. The other part of the Return, *viz.* That the Jury had acquitted those indicted, *against the Direction of the Court in Matter of Law*, was also adjudged to be *naught*, and unreasonable, and the *fining the Juries for giving their Verdict in any Case* concluded to be illegal, for the several Reasons before *recited*, and other Authorities of Law urged to that purpose; and all the Precedents and Allegations brought to justify the *Fine and Commitment*, solidly answered. Whereupon the Chief Justice *delivered the opinion of the Court*, That the Cause of Commitment was *insufficient*; and accordingly the said *Busbel*, and other his Fellow-Prisoners, were *discharged*, and left to the Common Law for *Remedy and Reparation of*
the

the Damages by that tortuous *illegal* Imprisonment sustained,

Which Case is (amongst others) reported by that learned Judge Sir *John Vaughan*, at that time Lord Chief Justice of the *Common-Pleas*, setting forth all the Arguments, Reasons and Authorities on which the Court proceeded therein; from which I have extracted most of the *Reasons* which I before recited for this Point, and for the greatest part in the *very Words* of that reverend Author.

Jurym. This *Resolution* hath, one would think, (as you said) *knocked this* illegal Practice on the head, beyond any possibility of *Revival*; but may it not one Day be *denied* to be Law, and the contrary *justified*?

Barr. No such thing can be done without apparent *violating* and subverting all *Law*, *Justice*, and *Modesty*; for though the *Precedent* itself be valuable, and without further inquiry is wont to be allowed, when given thus *deliberately* upon solemn debate by the whole Court; yet, 'tis not only *that*, but the sound, substantial and everlasting *Reasons*, whereon they grounded such their Resolves, that will at all times *justify* fining of Juries in such Cases to be *illegal*. Besides, as the *Reporter* was must considerable, both in his *Quality* as Lord Chief Justice, and for his Parts, Soundness of Judgment, and deep Learning in the *Law*; so such his Book of Reports is *approved* and recommended

H

mended to the World, (as appears by the Page next after the Epistle) by the Right Honourable the present Lord Chancellor of *England*, Sir *William Scroggs*, now Lord Chief Justice of *England*; my Lord *North*, Chief Justice of the *Common-Pleas*; and in a word, by all the Judges of *England* at the time of publishing thereof: so that it cannot be imagined how any Book can challenge greater Authority, unless we should expect it to be particularly confirmed by Act of Parliament.

Jurym. You have answered all my *Scruples*; and since I see the Law has made so good *Provision* for Jurymens Privileges and Safety, God forbid any Juryman should be of so *base* a Temper, as to betray that (otherwise) impregnable *Fortress* wherein the Law hath placed him, to preserve and defend the just Rights and Liberties of his Country, by treacherously surrendering the same into the Hands of *Violence* or *Oppression*, though masked under ever so fair Stratagems and Pretences. For my own part, I shall not now decline to appear according to my Summons, and therefore (though I fear I have detained you *too long* already) shall desire a little more of your Direction about the Office of a Juryman in particular, that I may uprightly and *honestly* discharge the same.

Barr. Though I think, from what we have discoursed, being *digested* and improv'd by your own Reason, you may sufficiently inform yourself;

self; yet to gratify your Request, I shall add a few brief Remarks, as well of what you ought cautiously to *avoid*, as what you must diligently *pursue* and regard, if you would justly and truly do your Duty.

First, As to what you must avoid.

1. I am very confident, that you would not willingly violate *the Oath* which you take, but 'tis possible that *there are such*, who as frequently *break* them, as *take* them, through their *careless Custom* on the one hand, or *slavish Fear* on the other, against which I would fully caution you; that you may *defend* yourself and others, against any Enemies of your Country's Liberties and Happiness, and keep a good Conscience towards God and towards Man.

2. 'Tis frequent, that when Juries are withdrawn, that they may consult of their *Verdict*, they soon forget that solemn Oath they took; and that *mighty Charge* of the Life and Liberty of Men, and their Estates, whereof then they are made *Judges*; and on *their Breatk*, not only the *Fortunes* of the particular Party, but perhaps the Preservation or *Ruin* of several numerous Families does solely depend: Now I say, without due Consideration of all this; nay, sometimes without *one serious Thought* or consulted Reason offered *Pro* or *Con*, presently the *Foreman*, or one or two that call themselves *antient* Jurymen (though in truth they never *knew* what belongs to the

place more than a common *School-Boy*) rashly deliver their *Opinions*, and *all the rest* in respect to their supposed *Gravity* and *Experience*, or because they have the biggest *Estates*, or to avoid the trouble of *disputing* the Point, or to prevent the spoiling of *Dinner* by delay, or some such *weighty* Reason, forthwith agree *Blind-fold*, or else go to holding up of Hands, or telling of *Noses*, and so the *Major Vote* carries away *captive* both the *Reason* and the *Conscience* of the rest: Thus trifling with *Sacred Oaths*, and putting Mens Lives, Liberties and Properties (as it were) to the hap-hazard of *Cross* or *Pile*. This Practice, or something of the like kind, is said to be *too Customary* amongst some Jurors, which occasions such their extraordinary *Dispatch* of the weightiest or most intricate Matters; but there will come a time when they shall be called to a severe Account for their *Haste* and *Negligence*; therefore have a care of such *Fellow-Jurors*,

3. Such a *slavish Fear* attends many Jurors, that let the Court but direct to find *Guilty*, or *Not Guilty*, though they themselves see no just Reason for it; yea, oft-times though their own *Opinions* are contrary, and their *Consciences* tell them it ought to go *otherwise*; yet, right or wrong, accordingly they will bring in their *Verdict*; and therefore many of them never regard seriously the *course* and force of the Evidence, what and how it was delivered more or less to prove the *Indictment*, &c.
But

But as the Court sums it up, they find; as if Juries were appointed for no other purpose but to *echo* back what the Bench would have done. Such a base Temper is to be avoided, as you would escape being *forsworn*, even though your Verdict should be right; for since you do not know it so to be by your own Judgment or Understanding, you have *abused your Oath*, and hazarded your own Soul, as well as your Neighbour's Life, Liberty or Property, because you *blindly* depend on the Opinion, or perhaps *Passion* of others, when you were sworn well and truly to try them *yourselves*. Such an *implicite Faith* is near of kin to that of *Rome* in Religion, and (at least in the next degree) as dangerous.

4. There are some that make a Trade of being Jurymen, that seek for the Office, use means to be constantly continued in it, will not give a *disobliging* Verdict lest they should be discharged, and serve no more: these *standing Jurors* have certainly some ill game to play. There are others that hope to *signalize* themselves, to get a better Trade, or some *Preferment* by *serving a Turn*: there are others that have particular *Piques*, and a humour of Revenge against such or such *Parties*; if a Man be but *misalled* by some odious Name, or said to be of an exploded Faction — straight they cry, *hang him, find him Guilty*, no Punishment can be too bad for such a *Fellow*; in
such

such a Case they think it merit to *stretch* an Evidence on the Tenter-hooks, and *strain* a Point of Law, because they fancy it makes for the Interest of the Government. As if *Injustice* or *Oppression* could in any case be for the true Interest of Government, when in truth nothing more *weakens* or *destroys* it. But this was an *old Stratagem*, if thou *suffer this Man to escape*, thou *shalt not be Cæsar's Friend* : When Cæsar was so far from either *needing* or *thanking* them for any such base Services, that had he but truly understood them, he would severely have punished their *Partiality* and Tyranny.

All these and the like *pestilent Biasses* are to be avoided and abominated by every honest Jurymen.

But now as to the positive Qualifications requisite.

1. You that are Jurymen should first of all seriously regard the weight and importance of the Office ; your own Souls, other Mens Lives, Liberties, Estates, all that in this World are dear to them, are at stake, and in your hands ; therefore consider things well beforehand, and come substantially furnished and provided with sound and well grounded Consciences, with clear Minds, free from Malice, Fear, Hope, or Favour ; lest instead of *Judging* others, thou shouldest work thy own Condemnation, and stand in the sight of God our Creator

Creator and Judge of all Men, no better than a *Murderer*, or *perjured* Malefactor.

2. Observe well the Record, Indictment or Information that is read, and the several Parts thereof, both as to the Matter, Manner, and Form.

3. Take due notice and regard to the Evidence offered for Proof of the Indictment, and each part of it, as well to Manner and Form as Matter; and if you suspect any Subornation, foul Practice, or tampering hath been with the Witnesses, or that they have any Malice or sinister Design, have a special regard to the Circumstances or Incoherencies of their Tales, and endeavour by apt Questions to sift out the Truth, or discover the Villainy. And for your better Satisfaction, endeavour to write down the Evidence, or the Heads thereof, that you may the better recall it to Memory.

4. Take notice of the Nature of the Crime charged and what Law the Prosecution is grounded upon, and distinguish the supposed criminal Fact which is proved from the aggravating Circumstances which are not proved.

5. Remember that in Juries there is no Plurality of Voices to be allowed; seven cannot over-rule, or by virtue of Majority conclude five; no, nor eleven, one. But as the Verdict is given in the Name of all the twelve, or else it is void; so every one of them must be actually agreeing, and satisfied in his particular Understanding

standing and Conscience, of the Truth and Righteousness of such Verdict, or else he is forsworn. And therefore, if one Man differ in Opinion from his Fellows; they must be kept together, till either they by Strength of Reason or Argument can satisfy him, or he convince them. For he is not to be hector'd, much less punish'd by the Court into a Compliance; for as the Lord Chief Justice *Vaughan* says well *, *if a Man differ in Judgment from his Fellows, whereby they are kept a Day and a Night, though his Dissent may not in truth be as reasonable as the Opinion of the rest that agree, yet if his Judgment be not satisfied, one disagreeing can be no more criminal than four or five disagreeing with the rest.* Upon which Occasion the said Author recites a remarkable Case out of an antient † Law-Book; *A Juror would not agree with his Fellows for two Days, and being demanded by the Judges, if he would agree, said, he would first die in Prison; whereupon he was committed, and the Verdict of the eleven taken: but upon better Advice, the Verdict of the eleven was quash'd, and the Juror discharged without Fine; and the Justices said the way was to carry them in Carts (this is to be understood at Assizes where the Judges cannot stay, but must remove in such a time into another Country) until they agreed, and not by Fining them.* And as the Judges err'd in taking the Verdict of Eleven, so they did in imprisoning

* Rep. fol. 151.

† 41 H. 8. 11.

soning the Twelfth. And therefore you see, on second Thoughts released him.

6. Endeavour as much at your Circumstances will permit, at your spare Hours to read and understand the Fundamental Laws of the Country; such as *Magna Charta*, the Petition of Right, the late excellent Act for *Habeas Corpus's*, *Horn's Mirour of Justices*, Sir *Edw. Coke*, in his 2^d, 3^d, and 4th Parts of the Institutes of the Law of *England*, and Judge *Vaughan's* Reports: these are Books frequent to be had, and of excellent use to inform any Reader, of competent Apprehension, of the true Liberties and Privileges which every *Englishman* is justly intitled unto, and estated in by his Birth-right; as also the Nature of Crimes, and the Punishments severally and respectively inflicted on them by Law, the Office and Duties of Judges, Juries, and all Officers and Ministers of Justice, &c. Which are highly necessary for every Juryman in some competent measure to know; for the Law of *England* hath not placed Trials by Juries, to stand between Men and Death or Destruction to so little purpose, as to pronounce Men *Guilty*, without regard to the Nature of the Offence, or to what is to be inflicted thereupon.

For want of duly understanding and considering these things, Juries many times plunge themselves into lamentable Perplexities; as it befel the Jury who were the Tryers of Mr. *Udal*, a Minister, who in the 32^d Year of Queen
I Elizabeth.

Eliz. was indicted and arraigned at *Croydon* in *Surry**, for High-Treason, for defaming the Queen and her Government in a certain Book, intituled, *A Demonstration of the Discipline, &c.* And though there was no direct, but a scrambling Shadow of Proof, and though the Book, duly considered, contained no Matter of Treason, but certain Words which by a forced Construction were laid to tend to the Defamation of the Government, and so the thing prosecuted under that Name; yet the Jury not thinking that in pronouncing him Guilty, they had upon their Oath pronounced him Guilty of Treason, and to die as a Traitor; but supposing that they had only declared him *Guilty* of making the Book, hereupon they brought him in *Guilty*: but when after the Judge's Sentence of Death against him (which they never in the least intended) they found what they had done, they were confounded in themselves, and would have done any thing in the World to have revoked that unwary pernicious Verdict, when, alas! it was too late. Dr. *Fuller* has this witty Note on this Gentleman's Conviction, That it was conceived *Rigorous* in the *greatest*, which at best, (saith he) is *cruel* in the *least* Degree. And it seems so Queen *Elizabeth* thought it, for she suspended Execution, and he died naturally. But his Story survives, to warn all succeeding Jurymen to endeavour better to understand what it is

* See *State Trials*, fol. Vol. I. P. 161.

they

they do, and what the Consequences thereof will be.

7. As there is nothing I have said intended to encourage you to Partiality, or tempt any Juryman to a connivance at Sin and Malefactors, whereby those Pests of Society should avoid being brought to condign Punishment, and so the Law cease to be a Terror to Evil-doers; which were in him an horrible Perjury, and indeed a foolish Pity, or *Crudelis Misericordia*, a Cruel Mercy; for he is highly injurious to the Good, that absolves the Bad, when real Crimes are proved against them: so I must take leave to say, That in Cases where the Matter is dubious, both Lawyers and Divines prescribe rather Favour than Rigour. An eminent and learned Judge* of our own, has in this Advice and Wish gone before me: *Mallem reverà viginti Facinorosos mortem pietate evadere, quam justum unum injustè condemnari.* I verily (saith he) had rather twenty Evil-doers should escape Death through Tenderness or Pity, than that one innocent Man should be unjustly condemned.

I shall conclude with that excellent Advice of my Lord Coke †, which he generally addresses to all Judges, but may no less properly be applied to Jurors.—

Fear not to do Right to all, and to deliver your [Verdicts] justly according to the Laws;

* Fortescue, Cap. 27.

† In the Epilogue of his 4th Part of *Institutes*.

1
is nothing but a Betraying of the Suc-
cess that Reason should afford; and if you
thereby execute Justice, be assured of
the Blessing.

Though some may malign you, yet God
will give you his Blessing.

That though thereby you may offend
some Men and Favourites, yet you shall have
the favourable Kindness of the Almighty, and
of his Favourites.

And lastly, That in so doing, against all
scandalous Complaints and pragmatical Devi-
ces against you, God will defend you as with
a Shield. — *For thou, Lord, will give a Blessing
unto the Righteous, and with thy favourable Kind-
ness wilt thou defend him as with a Shield.*
Psalm. v. 15.

F I N I S.



